

Book Review: Brandon L. Garrett, *End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice*. Cambridge, MA: Harvard University Press, 2017. ISBN: 9780674970991 (Hardcover). 331 Pages. \$29.95.

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Brandon L. Garrett, who was named L. Neil Williams, Jr. Professor of Law at Duke University in 2018 after serving on the faculty of the University of Virginia School of Law since 2005, leaves no doubt about his position on the death penalty and the magnitude and urgency of attendant implications in his informative and widely accessible book, *End of Its Rope: How Killing the Death Penalty Can Revive Criminal Justice*. He stakes out his thesis in the volume's opening sentences: "We can abolish the death penalty. We *must* abolish the death penalty. . . . [para.] . . . [I]t is imperative that we do so, for its abolition will be a catalyst for reforming our criminal justice system" (1) (emphasis in original).

The modern era of capital punishment in the United States began in the aftermath of *Furman v. Georgia* (1972), in which five Supreme Court justices, for various reasons, agreed that the death penalty laws then in place throughout the country violated the 8th Amendment's prohibition against cruel and unusual punishments. Four years later, in the wake of

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widespread and often virulent legislative reactions (Zimring & Hawkins, 1986: 38-45), the Court upheld revised statutes that somewhat narrowed the class of death-penalty eligible crimes, incorporated standards designed to channel the discretion exercised by juries and judges in making life and death sentencing decisions, and allowed the sentencing authority to consider additional evidence relevant to the punishment decision (*Gregg v. Georgia*, 1976; *Jurek v. Texas*, 1976; *Proffitt v. Florida*, 1976; see Steiker & Steiker, 2016). The nation's death rows quickly began refilling. Executions resumed for the first time in a decade when convicted murderer Gary Gilmore died before a Utah firing squad in 1977 (Mandery, 2013: 429-430).

Concurrently, crime in America was on an upswing that continued into the 1990s. As Garrett describes in detail, death penalty developments kept pace in parallel. New death sentences mounted rapidly: 172 prisoners were added to the nation's death rows in 1979, annual admissions hovered in the upper 200s, and often exceeded 300 throughout the 1980s, and finally peaked at 330 in 1994 (Davis & Snell, 2018, p. 14). More than 3,000 individuals were under sentence of death nationwide by 1995, and more than 3,600 awaited execution at century's end (Davis & Snell, p. 13). Executions were carried out with increasing regularity, hitting double digits for the first time in 1984, with 21, more than doubling by 1995, with 56, and reaching their post-*Furman* height of 98 in 1999 (Davis & Snell, p. 15). Then, just when capital punishment appeared to be moving forward with the intensifying momentum of a runaway freight train, there began "the great American death penalty decline" (79).

Garrett first documents and then seeks to explain capital punishment's dramatic freefall over the past two decades. Seven states have abandoned the death penalty since 2004. New York's death-penalty statute was declared unconstitutional in 2004 and was not resuscitated. Between 2007 and 2013, legislatures in five states (New Jersey, New Mexico, Illinois, Connecticut, and Maryland) repealed laws authorizing capital punishment. Delaware's capital sentencing statute was invalidated by the state supreme court in 2016 and was not revived, reducing to 31 the number of states with death-penalty laws on their books. Eighty percent of Gallup Poll respondents reported favoring capital punishment for murder in 1994, compared to 60% in 2016, and 55% in 2017, the lowest level of support since 1972 (Gallup, 2017).

Executions nearly halved from their high water mark of 98 in 1999, to 52 in 2009, and then nearly halved again to 28 in 2015, followed by 20 taking place in just a handful of states in 2016, and 23 in 2017 (Death

Penalty Information Center, 2018). Yet the most eye-opening statistic concerns the number of death sentences imposed annually throughout the nation. The early 1980s through the late 1990s consistently saw between 250 and 330 prisoners added each year to the country's death rows. By 2001, the yearly total dropped to 164; it fell to 84 by 2011, and then plunged further, to 32 by 2016 (Davis & Snell, 2018: 14). The magnitude and rapidity of this decline in new death sentences, as Garrett correctly observes, is nothing short of "remarkable" (79).

What could account for this stunning reversal of fortune? Garrett identifies several commonly advanced theories: high profile DNA-based exonerations demonstrating that innocent people are at risk of execution; the fact that murders, and violent crime generally, have steadily fallen since the 1990s, reducing both the number of death-eligible offenders and the salience of crime and punishment as political issues; the introduction of life imprisonment without parole (LWOP) as an alternative punishment to death which ensures that murderers not executed will never be released to pose a threat to community safety; the aforementioned abolition of capital punishment in seven states and Supreme Court rulings which exempted intellectually disabled offenders (*Atkins v. Virginia*, 2002) and offenders younger than 18 (*Roper v. Simmons*, 2005) from death-penalty eligibility. All of these explanations seem plausible. Surprisingly, Garrett's research finds little or only modest support for most of them as contributing factors.

Garrett argues that conceptualizing the death penalty as an instrument of national or even statewide policies is misguided. Such an approach masks the important role that local decision-makers and actors play in the more than 3,000 counties throughout the United States in the administration of criminal justice generally and in the specific context of capital punishment. Indeed, just 2% of the nation's counties are responsible for producing a majority of the country's death row population (Death Penalty Information Center 2013). Garrett points out that during the heyday of the post-*Furman* death penalty into the 1990s, death sentences originated in hundreds of different counties. The number of active death-sentencing counties thereafter dropped steadily, until in 2015 death sentences were imposed in only 38 counties, and in just 27 counties in 2016 (139-140). He offers several reasons for the death penalty's notable "splintering" (138) in this fashion.

Their inordinate cost has made capital prosecutions a rarity in smaller counties, where property taxes and other revenues are more urgently needed for far more mundane matters, such as, paying public employees' salaries and keeping library doors open. Declining murder rates appear to

have made some contribution at the county level to smaller numbers of death penalty cases. Garrett suggests that inertia, or “muscle memory” (149) gradually settles in: as fewer cases are prosecuted capitally, a tapering effect takes hold. By the same token, until more aggressive use of the death penalty within counties abates, capital punishment will continue to be sought with some regularity. Changes in prosecutorial regimes may bring new policies, complemented by the previously noted inhibiting influences of high costs and dropping murder rates, to help inspire a downward trend in the death penalty’s use. Garrett’s analysis further reveals an association between counties’ racial composition and resort to the death penalty. He found “a strong correlation between the black population in a county and the number of death sentences in a county. . . . [Moreover,] counties that have more white victims of murder sentence substantially more people to death on average” (149).

Garrett offers particularly important insights about how the quality and character of defense lawyering can profoundly alter the course of potential capital cases. In the early post-*Furman* years defendants facing the death penalty were too often represented by lawyers who were inexperienced, inadequately prepared, woefully underpaid and bereft of supporting resources, or otherwise ill-suited for the extraordinary demands of a capital trial. For instance, Garrett describes the case involving a Houston defense lawyer who slept through portions of his client’s death-penalty trial, which resulted in a capital sentence. Both the Texas state courts and the initial federal court review astonishingly concluded that the lawyer’s performance did not amount to constitutionally ineffective assistance of counsel, a decision ultimately overturned by a federal appeals court. Quoting capital defense lawyer Stephen Bright, Garrett notes that for too many poor people this example epitomizes their version of a somnambulistic legal “dream team,” in stark contrast to the term’s normal usage in connection with wealthy criminal defendants (108, *quoting* Weinstein, 2000).

In probing more deeply for explanations of the death penalty’s downturn, Garrett seizes on the transformative nature of high quality, adequately funded, and team-based representation provided by defense counsel. He notes the push provided by Supreme Court decisions which toughened expectations for effective capital defense representation and describes how centralized or regional capital defense offices in New York, Texas, Virginia, North Carolina, and elsewhere brought new and highly effective approaches to the work of sparing their clients’ lives. Critical to this brand of defense lawyering was the collaboration of attorneys, investigators, and social workers, and their early case

involvement to piece together capital defendants' life histories in an attempt to dissuade prosecutors from seeking a death sentence or, failing that, to make a persuasive showing in mitigation at the penalty phase of trials resulting in conviction. In a nutshell, Garrett argues, experience demonstrates that "it takes a team" (10) to impress on prosecutors, jurors, and judges that criminal defendants cannot be defined solely by the heinous offense with which they are charged. Rather, they are individuals with complicated and often tragic life histories, who are not beyond redemption, compassion, and mercy.

This theme provides the essential segue to the book's subtitle: "How Killing the Death Penalty Can Revive Criminal Justice." There is no reason, Garrett maintains, that the lessons learned in capital cases, including team-based defense that strives to portray the fundamental humanity of defendants and to divert an attitude of punitiveness to an orientation favoring rehabilitation, should be so narrowly confined. With capital punishment "at the end of its rope," the time is right to usher in a welcome spillover effect throughout criminal justice, characterized by more effective approaches to defense lawyering, a disposition embracing mercy, a reinvestment of justice resources, and widespread adoption of smart-on-crime policies.

At this juncture, if not before, readers who are not philosophically aligned with Garrett's unabashed opposition to the death penalty may experience reservations or voice objections. Many will sympathize with his call for mercy and his emphasis on rehabilitation, but some will not. They will be left searching for a persuasive repudiation of retribution, if not proportionality between crime and punishment, as a legitimate objective of criminal justice (for example, see Blecker, 2013). This uneasiness will not be alleviated but could well be intensified by Garrett's correlative objection to life imprisonment without parole as an unduly harsh and ill-advised form of punishment, a sanction he critically describes as "the other death penalty" (187).

Others may seek further evidence that the death penalty's demise—if, indeed, that is its eventual fate—is either necessary or likely to propel merciful tendencies and widen the scope of smart-on-crime policies more generally. If the lessons to be extracted from the country's recent experiences with capital punishment already are apparent, why they must be coupled with the death penalty's abolition before they are given broader recognition is less than clear. Moreover, a considerably more pessimistic outcome is plausible, one that Garrett alludes to while noting one of the "special dangers that the end game [of capital punishment] poses. Pushing punishment down . . . may make the system less harsh,

but doing so cannot avoid the inherent challenge of making punishments fit the crimes” (258). An even less welcome outcome than maintaining the status quo is possible. The extraordinary life-ending quality of capital punishment captures public attention, and magnifies the consequences of error in systems of justice, unlike any other, less extreme criminal sanction. It is not inconceivable that the end of capital punishment, if and when it arrives, will sap the energy of efforts to reform criminal justice and in its place leave an attitude of relative indifference and an indisposition to act (see Acker & Bellandi, 2014).

In the final analysis, *End of Its Rope* is an unflinchingly optimistic volume in its confident auguring of the death penalty’s inevitable demise, the prognostication of a more compassionate punishment philosophy in its stead, and the adoption of more temperate and effective policies for the prevention of and responses to crime. It offers a lucid analysis of the factors that are likely to account for the remarkable recent waning of capital punishment, including examining county-specific influences and the important role of new, improved models of defense representation featuring teams of attorneys, investigators, and social workers who delve beyond the facts of a crime to construct defendants’ life histories and advocate that justice be tempered by a healthy measure of mercy. It makes a compelling case that reforms that have helped tame the country’s infatuation with capital punishment are overdue and are urgently needed elsewhere in criminal justice. It is a book that informs, prescribes, and inspires, and it is well worth reading.

REFERENCES

- Acker, James R. & Bellandi, Rose. 2014. “Deadly Errors and Salutory Reforms: The Kill That Cures?” In Marvin Zalman & Julia Carrano (eds), *Wrongful Conviction and Criminal Justice: Making Justice* (pp. 269-285). New York: Routledge.
- Atkins v. Virginia*, 536 U.S. 304 (2002).
- Blecker, Robert. 2013. *The Death of Punishment*. New York: Palgrave Macmillan.
- Davis, Elizabeth & Snell, Tracy L. 2018. *Capital Punishment, 2016*. Washington, D.C.: United States Department of Justice, Bureau of Justice Statistics. Available at <https://www.bjs.gov/content/pub/pdf/cp16sb.pdf> (last visited May 23, 2018).
- Death Penalty Information Center. 2018. *Facts About the Death Penalty*. Available at <https://deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited May 24, 2018).

- Death Penalty Information Center. 2013. *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All*. Available at <https://deathpenaltyinfo.org/documents/TwoPercentReport.pdf> (last visited May 24, 2018).
- Furman v. Georgia*, 408 U.S. 238 (1972).
- Gallup. 2017. *Death Penalty*. Available at <http://news.gallup.com/poll/1606/death-penalty.aspx> (last visited May 24, 2018).
- Gregg v. Georgia*, 428 U.S. 153 (1976).
- Jurek v. Texas*, 428 U.S. 262 (1976).
- Mandery, Evan J. 2013. *A Wild Justice: The Death and Resurrection of Capital Punishment in America*. New York: W. W. Norton & Co.
- Proffitt v. Florida*, 428 U.S. 242 (1976).
- Roper v. Simmons*, 543 U.S. 551 (2005).
- Steiker, Carol S. & Steiker, Jordan M. 2016. *Courting Death: The Supreme Court and Capital Punishment*. Cambridge, MA: The Belknap Press of Harvard University Press. <https://doi.org/10.4159/9780674974852>
- Weinstein, Henry. 2000. "A Sleeping Lawyer and a Ticket to Death Row," *Los Angeles Times* (July 15).
- Zimring, Franklin E. & Hawkins, Gordon. 1986. *Capital Punishment and the American Agenda*. New York: Cambridge University Press.